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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 271

LAWRENCE J. ROGGE AND EUGENE ROGGE, CO-
PARTNERS DOING BUSINESS UNDER THE FIRM
NAME AND STYLE OF SOURDOUGH EXPRESS, WIL-
LIAM MILLER AND MAX MILLER, CO-PARTNERS,
DOING BUSINESS UNDER THE FIRM NAME AND
STYLE OF GENERAL TRANSPORTATION COMPANY,
ALFRED GHEZZI, JR., BYRON GLEN ROBERTS, CLYDE
GORDON, RICHARD ZEHNDER AND MORT CASS,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (R. 16-57) and
the opinion of the circuit court of appeals (R. 81-
87) are not yet reported.

(1)

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered June 8, 1942 (R. 88). The petition for a writ of certiorari was filed July 31, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Secretary of the Interior was authorized to impose tolls upon freight and merchandise passing over the Richardson highway from Valdez to Fairbanks, Alaska, and, if so, whether the regulations imposing the tolls were reasonable.

STATUTE INVOLVED

Sections 2 and 3 of the Act of June 30, 1932, c. 320, 47 Stat. 446, 48 U. S. C. secs. 321a and 321b, provide:

SEC. 2. The Secretary of the Interior shall execute or cause to be executed all laws pertaining to the construction and maintenance of roads and trails and other works in Alaska, heretofore administered by said board of road commissioners under the direction of the Secretary of War; and all appropriations heretofore made, and now available, or that hereafter may be made, for expenditure by said board for meeting the cost of such work in the Territory of Alaska, are transferred to the Secretary of the Interior, to be thereafter administered

in accordance with the provisions of this Act; and the said board is directed to turn over to the Secretary of the Interior all equipment, materials, supplies, papers, maps, and documents, or other property utilized in the exercise of such powers, for the use of the said Secretary in the administration of the construction and maintenance of roads, tramways, ferries, bridges, and trails, and other works in the Territory of Alaska, heretofore administered prior to such date by said board.

SEC. 3. That with the approval of the President, the Secretary of the Interior shall have power, by order or regulation, to distribute the duties and authority transferred and appropriations pertaining thereto, as he may deem proper to accomplish a more economical and effective organization thereof, and to make rules and regulations governing the use of roads, trails, and other works, including the fixing and collection of tolls where deemed necessary and advisable in the public interest.

STATEMENT

In 1902 gold was discovered in the interior of Alaska. In the stampede of the following year prospectors, adventurers, and businessmen from the states disembarked at Valdez on the southern coast of Alaska and traveled northward to Fairbanks in the interior, establishing what was originally known as the Richardson Trail and what has since become one of Alaska's most important

roads, the Richardson Highway (R. 3). This road, approximately 371 miles in length, was constructed across lands which were then a part of the public domain (R. 3). In 1906 the Board of Road Commissioners for Alaska, under the direction of the Secretary of War, assumed control of the highway.¹ During this same year the United States constructed a ferry at the place where the highway crosses the Tanana River, approximately 280 miles north of Valdez (R. 3, 6). In succeeding years the highway was maintained and improved with federal funds (R. 3), no tolls being charged except \$1.00 for ferry service across the Tanana River (R. 8).

Since the Richardson Highway is passable only during the four-month period from June to September (R. 9), it soon became apparent that additional transportation facilities had to be provided if the resources of Alaska were to be effectively developed. Private attempts to construct a railroad having been unsuccessful, Congress in 1914 directed the President to construct and maintain a railroad in Alaska for national defense and other purposes. Act of March 12, 1914, c. 37, 38 Stat. 305, 48 U. S. C. secs. 301-308. Pursuant to this act the Government constructed, and continues to operate, a rail-

¹ Act of January 27, 1905, c. 277, 33 Stat. 616, as amended by the Act of May 14, 1906, c. 2458, 34 Stat. 192.

road from Seward to Fairbanks.² This railroad, providing year-round service, is in direct competition with the highway for freight and merchandise shipped to and from the United States (R. 9). Because of the limited volume of traffic and the high cost of maintenance and operation (especially in the winter months), the Government has operated the railroad at a loss. The competition between the railroad and the highway was sufficiently serious by 1930 so that a Special Select Committee on Investigation of the Alaska Railroad was appointed by the Senate to study the situation. Its report to Congress in 1931 stated:

Another factor that has slightly affected and will increasingly affect the Alaska Railroad adversely is the competition of automobiles and trucks using the Richardson Highway that has been constructed by the Government at a cost of some \$6,383,000, and upon which, during the fiscal year 1930, was expended for maintenance and otherwise, about \$303,000.

This highway begins at the port of Valdez, some 80 miles east of the Alaska Railroad, and extends north, in a general direction parallel therewith, 408 miles to Fairbanks. * * *

A Fairbanks resident importing an automobile by this route reported his running

² The President, by Executive Order No. 3861 of June 8, 1923, placed the Alaska Railroad under the supervision and control of the Secretary of the Interior.

time from Valdez to Fairbanks as 14 hours. The running time of passenger trains between Seward, the railroad's port, and Fairbanks is 18 hours. These facts afford a notion of the competitive potentialities of this Government built and maintained highway in juxtaposition with the also Government built and maintained Alaska Railroad, and it well might be urged that these facts also denote, at least, an apparent lack of coordination in the practical promotion of Governmental activities.³

As a result of this and other studies the Senate Committee on Commerce recommended that authority over the railroad and the highway be centralized in one administrative head, "with authority for fixing and collecting tolls where necessary or advisable in the public interest."⁴ Congress accordingly passed the Act of June 30, 1932, c. 320, 47 Stat. 446, 48 U. S. C. sec. 321 *et seq.*

Pursuant to this act the Secretary of the Interior assumed control of Richardson Highway (R. 5), and in 1935 with the approval of the President issued the following regulation (R. 5-6):

Tolls: For transportation of merchandise or freight over the Richardson Highway; there shall be charged and collected at or adjacent to the McCarty Ferry on the Tanana River, tolls equal to two and one-half ($2\frac{1}{2}$) cents per ton of such merchandise or

³ See S. Rep. No. 753, 72d Cong., 1st sess., pp. 1-2.

⁴ *Id.* at p. 3.

freight passing that point multiplied by the number of miles such merchandise or freight has been or is being carried over the said highway; No vehicle hauling such merchandise or freight shall be allowed to pass the designated toll station except upon payment of the tolls as herein provided. * * * all moneys so collected shall be deposited in the Treasury of the United States as miscellaneous receipts.

The usual ferry charges are not affected by these regulations.

In conformity with this regulation a toll station was established at the ferry on the Tanana River to collect tolls on freight moving between Valdez and Fairbanks, Alaska (R. 7). The practical effect of the regulations imposing the tolls is to eliminate the competition of truckers with the Alaska Railroad (R. 9-10).

On September 18, 1939, Clyde Gordon, a trucker engaged in transporting merchandise over the Richardson Highway, brought suit in the district court for the Territory of Alaska to enjoin the Government's toll collectors from imposing tolls. Gordon contended that the regulation was arbitrary and capricious. The district court dismissed the suit upon the ground that Congress properly delegated to the Secretary of the Interior power to impose tolls on public highways of Alaska and that the tolls were not unreasonable. *Gordon v. Nash*, 9 Alaska 701 (1940).

The United States then brought this action against Gordon and other truckers to collect the tolls which they have refused to pay, and which have been placed in escrow pending a determination of this suit.⁵ The district court held that the regulation imposing tolls was valid and rendered judgment for the United States (R. 14-15). The circuit court of appeals affirmed (R. 81-88). The truckers now request certiorari.

ARGUMENT

1. Petitioners, although recognizing that Congress can impose tolls for the use of the public highways of Alaska, contend that this power has not been delegated to the Secretary of the Interior (Pet. 16-22, 25, 26). This argument is without substance. Both the language and the legislative history of the Act of June 30, 1932, c. 320, 47 Stat. 446, 48 U. S. C. sec. 321, *et seq.*, make it clear that Congress intended by that act to confer on the Secretary of the Interior authority to protect the revenues of the Alaska Railroad by charging tolls on competitive traffic transported over the Richardson Highway. The statute specifically provides that the Secretary of the Interior "shall execute or cause to be executed all laws pertaining to the

⁵ The case was submitted to the district court upon an agreed statement of facts pursuant to Chapter XCV, p. 735, Compiled Laws of Alaska (1933).

construction and maintenance of roads and trails
 * * * in Alaska, heretofore administered * * *
 under the direction of the Secretary of War.”^{*}
 It further provides (section 3) that he may “make
 rules and regulations governing the use of the
 roads, trails, and other works, *including the fixing
 and collection of tolls where deemed necessary and
 advisable in the public interest.*” [Italics sup-
 plied.] The Senate Committee on Commerce, in
 recommending enactment of the legislation, said
 (S. Rep. No. 753, 72d Cong., 1st Sess., p. 2):

It must be apparent to everyone that com-
 petition between the Richardson Highway
 and the Alaska Railroad is becoming serious,
 and that something must be done to remedy
 the situation. This bill the purpose of
 which is to centralize the authority of both
 the railroad and highway under one admin-
 istrative head, with authority to fix and
 collect tolls where necessary or advisable in
 the public interest, will, in the opinion of
 your committee, help very materially in
 solving the problem. * * *

Included in the committee’s report was a letter
 from Secretary of the Interior Wilbur stating his
 interpretation of the toll provision in advance of
 its enactment (*id.* at p. 3):

^{*} The Richardson Highway was under the jurisdiction of
 the War Department until the Secretary of the Interior as-
 sumed control pursuant to the Act of June 30, 1932 (R. 3, 5).

Section 3 of the proposed bill contains authority for fixing and collecting tolls where necessary or advisable in the public interest, which would enable us to control competition on the Richardson Highway with the Alaska Railroad.

Surely it cannot be said in the light of these statements that Congress did not intend, when it passed the 1932 act, to authorize the Secretary of the Interior to charge tolls for the use of the Richardson Highway. Such a construction of the 1932 act will not, as petitioners assert (Pet. 17, 25), nullify the provisions of the Act of May 14, 1898, c. 299, sec. 6, 30 Stat. 409, 411. That statute relates to the establishment of private toll roads by persons other than the United States. Hence, its provisions are not applicable to the Richardson Highway.

2. Petitioners' contention (Pet. 5, 22-25) that the tolls are in any event illegal because imposed for the ulterior purpose of protecting the revenues of the Alaska Railroad is without merit. As its legislative history makes clear (*supra*, page 9), such was the very purpose of the 1932 act. Cf. *United States v. Dickerson*, 310 U. S. 554, 561-562. Congress by virtue of its plenary power over the Territory of Alaska (*Binns v. United States*, 194 U. S. 486) may pass legislation regulating and re-

stricting highway competition; it may even grant the railroad a complete monopoly. Cf. *Sproles v. Binford*, 286 U. S. 374, 394; *Stephenson v. Binford*, 287 U. S. 251, 271-273.

Nor are the tolls arbitrary and unreasonable because imposed on freight and merchandise only. The inherent differences between passenger and freight traffic, between private cars and motor-trucks, are differences sufficient to justify the classification in question. *Stephenson v. Binford*, 287 U. S. 251, 264 (1932). Then, too, as the district court pointed out (R. 55), the Secretary of the Interior may well have believed that highway competition for four months of the year might precipitate closing of the railroad needed throughout the year. The Secretary had ample authority under the 1932 act to forestall that eventuality.

And, finally, the fact that only a single toll station has been established to collect the tolls in question does not invalidate the Secretary's regulation (cf. Pet. 22-23). A single station at the Tanana River is sufficient, because of its strategic location, to enable the Secretary of the Interior to control the trucking operations which are most competitive with the Alaska Railroad.

CONCLUSION

The decision of the circuit court of appeals is in accord with the applicable decisions of this

Court, raising no new question of substance, and presents no conflict. It is therefore respectfully submitted that the petition should be denied.

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AUGUST 1942.

